UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------------------------X
IN RE: WORLD TRADE CENTER
DISASTER SITE LITIGATION 21 MC 100 (AKH)

AFFIRMATION IN RESPONSE TO MOTION FOR COMMON BENEFIT FEES

-------------------------X

EDWARD L.C. MARCOWITZ an attorney duly admitted to practice law before this Court, affirms the following under the penalties of perjury:

1. I am an attorney with the firm of BARASCH McGARRY SALZMAN & PENSON and I am fully familiar with the facts and circumstances which are addressed in this affirmation.

2. I make this affirmation in opposition to the motion of Worby Groner Edelman & Napoli Bern, LLP’s (hereinafter “WGENB”) motion requesting “Common Benefit Fees” of 5% of the net proceeds of selective plaintiff’s fees which, considering the voluntary reduction in legal fees to 25%, amounts to just under 20% of the fee in each case.

3. As an initial matter, we do not believe that this litigation warrants, common benefit fees, by any firm. In the area of mass torts and class actions, the many do traditionally benefit from the work of the few. And those few, certainly deserve to be compensated. In the Vioxx litigation for example, there are 102 Firms making claims to the “Common Benefit Fund”. There were, however, over Thirty Six Thousand Claimants and over $1.2 Billion Dollars in Legal Fees. The “Common Benefit Fund” there is made up of approximately $312 Million Dollars. The Court in that case directed a Special Master be appointed to make the stakeholder percentage determinations, if the attorneys themselves could not reach a consensus.

4. This application is a complete distortion of the well intentioned common benefit fee system. WGENB in this case represented over 10,000 claimants. How does one even go about figuring out what percentage of WGENB time was actually common benefit time?

5. Common Benefits Fees were established to address inequity and to make sure that the Lead Attorneys were adequately compensated for their work.

6. By some estimates WGENB stands to be compensated in the amount of $150,000,000.00. The idea that this compensation is inadequate defies logic and reason.

7. We agree with many of the assertions set forth in the affirmation of WGENB, and don't dispute most of it. In fact, other than the 30 Cases[1] that I have handled in my office my firm referred WGENB just under 500 cases.

8. The bottom line is, WGENB has 98% of the claimants. They did excellent work on behalf of their clients. They are being compensated extremely well for their excellent work, as they should. But contrary to their belief, other firms worked hard as well. On behalf of our clients we put in hundreds of hours. Ultimately, all firms agreed to the 25% fee. But the reality is that all of the smaller firms were lumped in with WGENB on that issue. And that issue arose because of the enormity of the fee, one of which WGENB is receiving probably 99.9 % of. To ask smaller firms, who have nevertheless done

---

[1] What is puzzling to me is that I had several conversations with Mr. Napoli over the years wherein I informed him that the only reason I kept the 30 Cases in my office was because they were referred to me directly by the Wertheirmer Firm. I said to him "How many ways can the fee be split?" He never once said to me "what's the point I'm getting 20% anyway!" In fact, his response was "that makes sense."

considerable work on behalf of their clients, to incur an additional 20% loss is simply punitive.

9. For all of the above stated reasons it is the position of my firm that no common benefit fees be awarded to any firm in this matter. That all work done and compensation received was commensurate and in direct portion to the work that was required of each firm.

10. Notwithstanding the foregoing, if the Court is so inclined to award common benefit fees to WGENB as requested, then I respectfully request that WGENB be required to place 5% of their direct client's net recovery into a "common benefit fund".

11. It is respectfully submitted that over the years other plaintiff's firms, including Barasch McGarry Salzman & Penson, did work that provided a common benefit to WGENB clients as well. As such we are stake holders to a portion of fees earned by them. Certainly what is good for the goose is good for the gander.

12. The common benefit fund is a species of *quantum meruit* recovery. It was established in the context of class action lawsuits to prevent the representative plaintiff from having to bear the brunt of the expenses of a litigation from which non-active plaintiff's would benefit without lifting a finger to litigate. Clearly, this is not the situation in the World Trade Center cases. Some firms did work which inured a benefit to all; some just did their own work. But prior to a lead counsel being appointed, all firms litigated these cases as befits any other personal injury toxic tort action.

13. Curiously, any putative fund has already been materially depleted by WGENB in advance of a determination that firms have an interest in any portion of it. WGENB has stipulated with other liaison firms not to tax their settlements. Arguably, these

firms, having the lion's share of the cases, would have contributed the significant monies to the common benefit fund. Since WGENB has stipulated away more than 50% of the fund, then the percentage hold back should be similarly reduced. If the Court finds in its discretion that WGENB is entitled to the entire hold back, that hold back percentage should be commensurate with the percentage of the attorneys forced to contribute to it. If WGENB is comfortable bargaining away 5% of millions of dollars, the other attorneys not privy to the stipulation should not have to make up this deficit.

14. Our firm is Trial Counsel to the Wertheimer Firm on behalf of 30 courageous Sanitation Workers.

15. In addition, our firm was Liason Counsel on this docket before WGENB. However, since all of our early clients elected to seek their compensation through the September 11, 2001 Victims Compensation Fund, we relinquished that role. Consequently, prior to the WGENB Firm being involved in this case, our office had done significant legal research and investigation and gathered numerous documents and materials which we provided to WGENB, including turning over all of our 50h transcripts to WGENB during the liability phase of the litigation.

16. Your affirmant personally spent countless hours reviewing materials at Mr. Napoli's request. For two and half years (before the start of the negotiations concerning the SPA) your affirmant was one of only 11 inside lawyers to whom Mr. Napoli was emailing hundreds of pages of materials for review and comment. I spent many hours reviewing these materials, which had a common benefit to all.

17. I am happy to detail all of the work that my firm provided for the common benefit of all at any forum or hearing to determine the fair and reasonable percentages to be employed herein.

WHEREFORE, it is respectfully requested that the application be denied in it's entirety; or in the alternative that the WGENB Firm be required to place 5% of the net recovery of their clients cases into a “Common Benefit Fund” so that any attorneys who provided work for the common benefit of WGENB clients can present proof at a later date that they are valid stake holders and as such collect a portion of those fees.

Pursuant to 28 U.S.C. § 1746, I declare under the penalties of perjury that the foregoing is true and correct, except to those things stated upon information and belief and as to those things, I believe them to be true. Executed this 28th day of January, 2011.

Dated: January 28, 2011
New York, New York

BARASCH McGARRY SALZMAN & PENSON
Attorneys for Barasch Plaintiffs

Edward L.C. Marcowitz (9620)
11 Park Place, New York, NY 10007
(212) 385-8000
ed@firelaw.com